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NO. 91-0110

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

HERBERT W. FIELDS, JR.,
Petitioner,

V.

HARTFORD CASUALTY INSURANCE COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Gary L. Wickert
Counsel of Record
Loren R. Smith
HUGHES, WATTERS & ASKANASE
1415 Louisiana, 37th Floor
Houston, Texas 77002
(713) 759-0818

ATTORNEYS FOR RESPONDENT,
HARTFORD CASUALTY INSURANCE
COMPANY

EDITOR'S NOTE

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COMPANY

QUESTION PRESENTED

Whether a surety who pays a tax debt of another is subrogated to the State's right to an exception from discharge under 11 U.S.C. § 523(a)(1)(A).

LIST OF PARTIES

Herbert W. Fields, Jr.
- Petitioner

Michael J. Pledger,
PLEDGER & PLEDGER
- Counsel for Petitioner

Hartford Casualty Insurance Company
- Respondent

Gary L. Wickert, Loren R. Smith,
HUGHES, WATTERS & ASKANASE
- Counsel for Respondent

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CONSTITUTIONAL PROVISIONS AND STATUTES

11 U.S.C. § 523(a)(1)(A):

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-

(1) for a tax or a customs duty-

(A) of the kind and for the periods specified in section 507(a)(2) or 507(a)(7) of this title, whether or not a claim for such tax was filed or allowed;

11 U.S.C. § 509(a):

(a) Except as provided in subsection (b) or (c) of this section, an entity that is liable with the debtor on, or that has secured, a claim of a creditor against the debtor, and that pays such claim, is subrogated to the rights of such creditor to the extent of such payment.

11 U.S.C. § 507(d):

(d) An entity that is subrogated to the rights of a holder of a claim of a kind specified in subsection (a)(3), (a)(4), (a)(5), or (a)(6) of this section is not subrogated to the right of the holder of such claim to priority under such section.

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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Hartford Casualty Insurance Company ("Hartford") respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the judgment of the United States Court of Appeals for the

Fifth Circuit in this case. The opinion of the Fifth Circuit is reported at 926 F.2d 501 (5th Cir. 1991).

STATEMENT OF THE CASE

A. Factual Background

Petitioner Herbert W. Fields, Jr. ("Fields") filed for protection under Chapter 11 of the Bankruptcy Code on December 28, 1984. Hartford issued two surety bonds for corporations owned by Fields in favor of the State of Texas. These surety bonds covered a mixed beverage permit bond for corporations owned by Fields known as Corky's Country and Carlos' 'N Charlie's Del Norte, Inc. The bonds, required by Tex. Alco. Bev. Code Ann. § 204.01(a)(3) (Vernon 1978), bound Fields as principal and Hartford as surety to the State of Texas for payment of all permit fees, service fees, taxes

and penalties assessed by the Texas Alcoholic Beverage Commission. The bonds covered taxes for the periods of December 28, 1984 to October 16, 1985 and February 19, 1985 to October 2, 1985.

Fields failed to pay the taxes. Pursuant to the surety bond requirements, Hartford paid $15,479.58 to the State of Texas on November 21, 1985. Fields's bankruptcy case was administratively consolidated with Corky's Country and Carlos' 'N Charlie's Del Norte, Inc. on January 11, 1986. Then, on October 29, 1986, the bankruptcy case was converted to a case under Chapter 7.

B. Procedural History

Hartford Casualty Insurance Company filed its "Complaint to Determine Dischargeability of Debt Pursuant to 11 U.S.C. 523(a)(1)(A)" in Fields's

bankruptcy case on February 9, 1988. The United States Bankruptcy Court for the Southern District of Texas, Houston Division, ruling in Hartford's favor, entered an order on March 16, 1989 declaring Hartford's claim against Fields based on its payment to the State of Texas as a surety for Fields's tax debt nondischargeable. The United States District Court for the Southern District of Texas, Houston Division, affirmed the Bankruptcy Court's order of nondischargeability on July 13, 1990. The United States Court of Appeals for the Fifth Circuit affirmed the District Court and Bankruptcy Court rulings on March 21, 1991. This case is an appeal of the Fifth Circuit's decision.

REASONS THE PETITION SHOULD BE DENIED

Fields fails to raise any special or

important reasons to warrant granting its petition for a writ of certiorari. The arguments made by Fields have been decided against him by every court reviewing the issue with only one aberration. The only Circuit that has decided the issue contrary to Hartford's position did so in a case under the Bankruptcy Act, and the two Circuits ruling on the issue under the Bankruptcy Code have ruled in favor of Hartford's position. Contrary to Field's argumentative statement of the question presented, this case does not involve preemption. The Fifth Circuit's ruling that Hartford is subrogated to the rights of the State of Texas is supported by the provisions of the Bankruptcy Code.

It is uncontested that the tax debt owed by Fields to the State of Texas is of the type that is excepted from discharge

pursuant to 11 U.S.C. § 523(a)(1)(A). *Fields*, 926 F.2d at 503, fn.3. As the Fifth Circuit observed, "if there had been no surety arrangement in this case and the claim was asserted by the State of Texas rather than Hartford, the debt would be nondischargeable under 11 U.S.C. § 523(a)(1)(A)." *Id.* Hartford, which paid the debt as a surety, should be subrogated to the State of Texas's right to an exception from discharge.

I. ALL COURTS BUT ONE FACED WITH THE ISSUE OF THIS CASE HAVE HELD THAT A SURETY IS SUBROGATED TO THE NONDISCHARGEABLE RIGHT OF A TAXING AUTHORITY

Every court dealing with the issue of this case has ruled that a surety is subrogated to a taxing authority's standing to assert nondischargeability

under 11 U.S.C. § 523(a)(1)(A),[1] with only one aberration. The only contrary decision, the case upon which Fields principally relies,[2] was decided under the Bankruptcy Act. Since there is almost

---

[1]*See Fields*, 926 F.2d at 504; *Western Surety Co. v. Waite (In re Waite)*, 698 F.2d 1177 (11th Cir. 1983); *Gilbert v. United States Fidelity & Guaranty Co.*, 180 F. Supp. 794 (M.D. Ga. 1959), *aff'd*, 274 F.2d 823 (5th Cir. 1960); *Safeco Ins. Co. of America v. Norris (In re Norris)*, 107 Bankr. 592 (Bankr. E.D. Tenn. 1989); *In re Trasks' Charolais*, 84 Bankr. 646 (Bankr. D. S.D. 1988); *Cooper v. Cooper (In re Cooper)*, 83 Bankr. 544 (Bankr. C.D. Ill. 1988); *Garton v. Zoglman (In re Zoglman)*, 78 Bankr. 213 (Bankr. W.D. Wis. 1987); *Salaki v. Caffrey (In re Caffrey)*, 77 Bankr. 219 (Bankr. W.D. Mo. 1987); *Gordon's Jewelry Co. of New Jersey, Inc. v. Goldstein*, 66 Bankr. 909 (Bankr. W.D. Pa. 1986); *Thomas Int'l Corp. v. Morris (In re Morris)*, 31 Bankr. 474 (Bankr. N.D. Ill. 1983)[not to be confused with *Iowa State Dept. of Social Services v. Morris (In re Morris)*, 10 Bankr. 448 (Bankr. N.D. Iowa 1981), cited by Fields without page reference]; *Rankin v. Alloway (In re Alloway)*, 37 Bankr. 420 (Bankr. E.D. Pa. 1984); *Hancock v. Country Mutual Ins. Co. (In re Hancock)*, 36 Bankr. 709, (Bankr. S.D. Ill. 1984); *Woerner v. Farmers Alliance Mutual Ins. Co. (In re Woerner)*, 19 Bankr. 708 (Bankr. D. Kan. 1982); *Federal Mutual Ins. Co. v. Gibbs (In re Gibbs)*, 11 Bankr. 320 (Bankr. W.D. Mo. 1981); *Fidelity & Casualty Co. v. Whitaker*, 176 Ga. 656, 168 S.E. 607 (Ga. 1933); *St. Paul Mercury Indemnity Co. v. Donaldson*, 225 S.C. 476, 83 S.E.2d 159 (1954).

[2]*Nat'l Collection Agency, Inc. v. Trahan*, 624 F.2d 906 (9th Cir. 1980).

universal agreement on the issue of this case, it does not merit certiorari.

II. THIS CASE CONTAINS NO SUPREMACY CLAUSE ISSUE BECAUSE FEDERAL BANKRUPTCY LAW SUPPORTS HOLDING HARTFORD'S CLAIM NONDISCHARGEABLE.

This case does not present a Supremacy Clause issue. The question facing this court is not a conflict between Federal Bankruptcy law and state law, but is one of interpretation of the provisions of the Bankruptcy Code.[3]

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[3]Fields contends that the Fifth Circuit chose state subrogation law over Federal Bankruptcy law. The state law Fields refers to is Tex. Bus. & Comm. Code Ann. § 34.04(b) (Vernon 1987) which provides that a surety "is subrogated to all of the judgment creditor's rights." Also, the Supreme Court of Texas has held that a surety is subrogated to all of the rights of the original creditor: "Because the surety promises to pay the debt of another, equity confers the right of subrogation. If the surety or party in the position of a surety pays the debt of the principal, the surety is subrogated to all of the rights, remedies, equities, and securities of the creditor." Crimmins v. Lowry, 691 S.W.2d 582, 585 (Tex. 1985).

However, the Fifth Circuit based its holding in part on the language of 11 U.S.C. § 507(a)(7): "Because Texas required the bond specifically to secure payment of the taxes, we think the debt paid

Hartford's right of subrogation is supported by a careful reading of Federal Bankruptcy statutes 11 U.S.C. § 523(a)(1)(A), 11 U.S.C. § 509(a), and 11 U.S.C. § 507(d).

A. 11 U.S.C § 523(a)(1)(A) Supports Holding Hartford's Claim Nondischargeable.

Section 523(a)(1)(A) supports holding Hartford's claim nondischargeable. On its face, 11 U.S.C. § 523(a)(1)(A) may be read to allow such subrogation.

> While the Court is aware of the rule that (sic) the nondischargeability provisions are to be read liberally in favor of a debtor's fresh start, to read section 523(a)(1) to be limited to debts actually owed to the tax collector or those obligations actually entitled to priority under section 507(a)(7) of the Code would be to read into the statute language that is simply not there.

---

by the surety is a tax "of the kind" specified in § 507(a)(7)(sic)." *Fields*, 926 F.2d at 504, fn.8.

Cooper, 83 Bankr. at 544.

> The Debtor argues that [the surety] is not entitled to this subrogated status, claiming that this status is for governmental entities only. The very face of the various sections of the Bankruptcy Code speak otherwise. Section 523(a)(1)(A) holds nondischargeable any debt for a tax *of the kind* specified in § 507(a)(6)[now § 507(a)(7), renumbered 1984].

Goldstein, 66 Bankr. at 920 (emphasis original). A debt paid by a surety for nonpayment of taxes is a tax *of the kind* specified in 11 U.S.C. § 507(a)(7). As the Fifth Circuit reasoned, since Texas by statute specifically requires the bond for payment of taxes, the debt falls under the Bankruptcy Code's definition of "tax". *Fields*, 926 F.2d at 504, fn.8.[4]

---

[4]It should be noted that *Trahan* was decided under the former 11 U.S.C. § 35, a statute which did not have the "of the kind" language which is now contained in § 523(a)(1)(A). "The exception appears in altered form in the new statute, which does not have retroactive applicability. *See* 11 U.S.C. § 523." *Trahan*, 624 F.2d at 907, fn.1. As

B. 11 U.S.C. § 509(a) Supports Holding Hartford's Claim Nondischargeable.

Section 509(a) also supports holding Hartford's claim nondischargeable. The express provision of subrogation for a surety in § 509(a) extends to the right of nondischargeability as well:

> While the Court has previously explained its reason for finding the Debtor's equitable claims here inappropriate, we find that even if this characterization were appropriate, [the surety] would still have the rights requested, under § 509(a) of the Code. . . .
>
> As [the surety] paid the taxing authority, it is subrogated to the taxing body's right to payment, which includes the right to have the payment held to be nondischargeable.

Goldstein, 66 Bankr. at 920. *See also* Redmond, B., *Annotation--Bankruptcy: Codebtor's Subrogation Rights under 11*

---

such, the holding of *Trahan* has been undercut by the enactment of the Bankruptcy Code.

USCS § 509, 86 A.L.R. Fed. 886, 895.

C. 11 U.S.C. § 507(d) Supports Holding Hartford's Claim Nondischargeable.

Section § 507(d) also supports holding Hartford's claim nondischargeable. This section provides that a surety is not subrogated to the *priority* status of a taxing authority. However, courts have held that this section does not prevent a surety from being subrogated to *nondischargeability* status of a taxing authority.[5] Instead, if a surety's claim

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[5]*Waite*, 698 F.2d at 1178; *Cooper*, 83 Bankr. at 548, & fn.12 ("The fact that section 507(d) denies the priority to that claim does not alter the character of the claim and is wholly irrelevant to dischargeability. Nothing in section 523(a)(1) makes dischargeability of a tax claim of this type contingent on actual entitlement to priority."); *Goldstein*, 66 Bankr. at 920 ("We read this as it is stated-that the taxes held nondischargeable are the same taxes listed as having priority status under § 507-not that the priority itself has any effect on the debt's nondischargeable status."); *Norris*, 107 Bankr. at 594 ("However, the right to priority under § 507 is not required in order for a tax debt to be nondischargeable under § 523(a)(1)(A).").

was not subrogated to the nondischargeable status, § 507(d) would be unnecessary.

> This section evidences two things to this Court:
>
> > (1) a tax claim *can* be subrogated; and,
> >
> > (2) the subrogee is not entitled to the subrogor's priority status.
>
> If another entity, such as [the surety], could not be subrogated to a tax claim, the language including tax claims in § 507(d) would be unnecessary. As it must be assumed that Congress would not include superfluous language in the statute, it must be given its clear meaning.
>
> Clearly then, it appears to this Court that [the surety] has a right to be subrogated to the right of the [taxing authority], to the extent of having its claim be held nondischargeable.

Goldstein, 66 Bankr. at 920 (emphasis original).

III. PUBLIC POLICY SUPPORTS HOLDING HARTFORD'S CLAIM NONDISCHARGEABLE.

Public policy also supports a holding

that these tax debts nondischargeable. A holding that these debts are dischargeable would ultimately harm tax-paying businesses, and would hinder businesses reorganizing under Chapter 11. Initially, it would encourage businesses with unsure financial standing to delay in paying their taxes.

> A debtor who fails to pay taxes before bankruptcy usually bears the burden of that failure after bankruptcy by being liable for a nondischargeable tax debt. However, if the debt to the surety is dischargeable, then the debtor can choose not to pay taxes with the knowledge that he can escape liability by filing bankruptcy and discharging the surety's claim. A debtor should not be given this choice. Therefore, the court adopts the view that the policy behind the dischargeability statute is better served by making the surety's claim non-dischargeable to the extent the surety paid a nondischargeable tax.

Norris, 107 Bankr. at 596. It would be especially unfair to a surety in

Hartford's position to hold these debts dischargeable, having dealt with Fields after he had filed for protection under Chapter 11. If it is determined that these debts are dischargeable, few sureties will deal with principals whose businesses are in financial trouble, especially those in reorganization under Chapter 11, out of fear that the principals or their businesses will later file or convert their cases to Chapter 7. The Ninth Circuit recognized that their holding would increase the cost of contracting with sureties. *Trahan*, 624 F.2d at 907, fn.2. However, this increased cost would ultimately be passed on to tax-paying businesses.

Fields relies on the *Trahan* rationale that the purpose of the statutory exception to discharge is to assure tax

collection by taxing authorities. *Trahan* rationalizes that the taxing authority will get paid one way or the other, either by the debtor or the surety. *Trahan*, 624 F.2d at 907. However, even if this was the only purpose behind the statutory exception, the argument is not convincing. One court, in criticizing this postulation of *Trahan*, stated:

> Suppose, however, that the exception from discharge is intended purely to preserve government revenue. If the policy of the exception from discharge is to promote the collection of taxes, then that policy is served indirectly by excepting the surety's subrogation claim from discharge. The question is whether the policy behind the exception is a narrow policy to allow the collection of nondischargeable taxes from debtors or a broader policy of promoting the payment of nondischargeable taxes by debtors *and sureties*. This court adopts the broader view of the policy behind the exception.

Norris, 107 Bankr. at 595 (emphasis original).

Finally, the argument proposed by Fields that a ruling of nondischargeability frustrates the policy of a "fresh start" is not compelling. The weakness of this argument is readily apparent:

> A debtor's fresh start is not overburdened by excepting a surety's subrogation claim from discharge. The debtor's fresh start is the same; he owes the same amount of nondischargeable tax debt; the only difference is whether the debtor owes the debt to the government or the surety.

Norris, 107 Bankr. at 596; *Fields*, 926 F.2d at 504, fn.8.

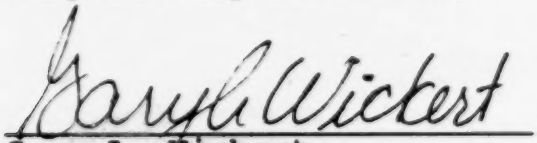
CONCLUSION

Congress intended certain tax debts to be nondischargeable in Bankruptcy. All courts but one dealing with the issue of this case

have held that a surety should be subrogated to the rights of a taxing authority in seeking an exception to discharge. To remove the surety's right of subrogation would ultimately put an unfair burden on tax-paying businesses and businesses seeking to reorganize. Finally, a debtor's fresh start will not be hampered, for the debtor will still owe the same amount of nondischargeable tax debt.

WHEREFORE, Hartford Casualty Insurance Company prays that certiorari be denied.

Respectfully submitted,



Gary L. Wickert
Counsel of Record
Loren R. Smith
1415 Louisiana, 37th Floor
Houston, Texas 77002
(713) 759-0818

APPENDIX

Appendix "A"	Tex. Alco. Bev. Code Ann. § 204 (Vernon 1978).
Appendix "B"	U.S. Bankruptcy Court Memorandum Opinion signed March 15, 1989.
Appendix "C"	Published Opinion of the U.S. Court of Appeals for the Fifth Circuit, entered March 21, 1991.

APPENDIX "A"

CHAPTER 204. BONDS

Section

204.01. Bond Required.
204.02. Form and Conditions.
204.03. Amount of Bond.
204.04. Multiple Permits, One Bond.
204.05. Cancellation of Bond.

Section 204.01. Bond Required

(a) Except as otherwise provided in this section, the following licensees and permittees shall furnish a bond:

(1) those authorized to import alcoholic beverages into the state;

(2) manufacturers of beer and brewers of ale or malt liquor in the state;

(3) permittees subject to the gross receipts tax on mixed beverages imposed by Section 202.02 of this code; and

(4) all other permittees.

(b) No bond is required of a holder of a carriers, local cartage, wine and beer retailers, nonresident seller's, manufacturer's agent's, or agent's permit.

(c) No bond is required of a retail licensee or permittee who is not responsible for the primary payment of an alcoholic beverage excise tax to this state. This subsection does not exempt permittees subject to the gross receipts tax on mixed beverages imposed by Section 202.-02 of this code.

(d) A permittee required to furnish a bond to secure the payment of the gross receipts tax on mixed beverages may furnish, in lieu of all or part of the amount of the bond required:

(1) one or more certificates of deposit or savings assigned to the state, issued by one or more banks or savings institutions authorized to do business in this state; or

(2) one or more letters of credit issued by one or more banks or savings institutions authorized to do business in this state.

(e) If certificates of deposit or savings or letters of credit are furnished under Subsection (d) of this section, the administrator shall keep them in his possession. Interest earned on a certificate of deposit or savings is not subject to the assignment and remains the property of the owner of the certificate.

Amended by Acts 1977, 65th Leg., p. 1183, ch. 453, § 11, eff. Sept. 1, 1977.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
ENTERED

MAR 16 1989

Jesse E. Clark, Clerk
By Deputy:

APPENDIX "B"

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

IN RE:	§	
	§	
HERBERT W. FIELDS, JR.	§	CASE NO. 84-06303-H1-7
	§	
Debtor	§	
	§	
HARTFORD CASUALTY INSURANCE COMPANY	§	
	§	
Plaintiff	§	
	§	
VS.	§	ADVERSARY NO. 88-0109-H1
	§	
HERBERT W. FIELDS, JR.,	§	
	§	
Defendant.	§	

MEMORANDUM OPINION

Pending before this court is a complaint to determine dischargeability of debt pursuant to 11 U.S.C. §523(a)(1)(A), filed by Hartford Casualty Insurance Company. Also pending before this court is defendant, Herbert W. Fields', Jr., motion to dismiss complaint. After careful consideration of the pleadings and points of law raised, this court concludes that Hartford's claim is nondischargeable and that defendant's motion to dismiss is denied.

This court has jurisdiction of this proceeding pursuant to 28 U.S.C. sections 1334 and 157(b)(2)(I) and the Order of Reference of Bankruptcy Cases and Proceedings Nunc Pro Tunc issued on August 9, 1984 by the Chief District Judge of the Southern District of Texas.

Hartford issued two surety bonds on a mixed beverage permit for corporations owned by Fields in favor of the State of Texas. The surety bonds bound Fields as principal and Hartford as surety to the State of Texas for the payment of permit fees, service fees, taxes and penalties assessed by the Texas Alcohol Commission. Taxes covered by the surety bonds were for the periods of December 28, 1984 to October 16, 1985 and February 19, 1985 to October 2, 1985. Fields failed to pay the taxes, and pursuant to the surety bond requirements, Hartford paid $15,479.58 to the State on November 21, 1985. Fields filed a chapter 11 bankruptcy petition on December 28, 1984. This case was administratively consolidated with Carlos and Charlies Inc. and Corkey's Country, Inc. on January 11, 1986. The case was converted to a chapter 7 on October 29, 1986.

Hartford seeks recovery from Fields for the amount paid to the state. The claim for taxes arose after the filing of the chapter 11 petition but prior to conversion to chapter 7. Under 11 U.S.C. § 348(d)

> [a] claim against the estate or the debtor that arises after the order for relief but before conversion in a case that is converted under section 1112, 1307, or 1208 of this title, other than a claim specified in section 503(b) of this title, shall be treated for all purposes as if such claim had arisen immediately before the date of the filing of the petition.

With the exception of administrative claims under this section, claims arising prior to conversion are treated as prepetition claims. In its complaint, Hartford contends that the debt pursuant to surety bond qualifies as a tax falling within the ambit of 11 U.S.C. § 507(a)(7) and is excepted from discharge under 11 U.S.C. § 523(a)(1)(A).

This court is presented with the issue of whether the debt owed is nondischargeable. Initially, this court notes that the party seeking an exception to discharge bears the burden of proof as to nondischargeability. In the matter of Binich, 811 F.2d 943 (5th Cir. 1987). Fields contends that because Hartford is not a taxing authority, it has no right to

levy taxes and is not entitled to nondischargeability status under 11 U.S.C. § 523(a)(1)(A), providing an exception to discharge for taxes. Fields contends that the exception was promulgated to facilitate tax collection and that because Hartford is not a taxing authority, this policy concern is not promoted by rendering Hartford's claim nondischargeable. The fees charged by Hartford, for the issuance of surety bonds according to Fields, are designed to protect Hartford against losses. Fields contends that the debt due Hartford arose as a result of an indemnity agreement rather than as a tax.

Fields contends that dischargeability of debts should take precedence over state law theories of equitable subrogation. Fields relies on The National Collection Agency, Inc. v. Trahan, 624 F.2d 906 (9th Cir. 1980), as authority for the proposition that the dischargeability exception is not applicable to a surety which pays a tax to the state. In Trahan, a surety contracted with Trahan to post a bond with the state. Trahan failed to pay the tax, and an action was brought in state court by the surety's assignee to recover the amount paid by the surety to the state. Trahan filed bankruptcy and sought a declaration that

the debt was discharged. The court focused on two policy considerations: the favoring of discharge of debts and the collection of taxes by governmental entities. Id. at 907. The Ninth Circuit ruled that the policy promoting dischargeability of debts overrides an application of equitable subrogation, rendering the debt dischargeable. The court concluded that the policy of promoting tax collection would not be furthered if subrogation was permitted, reasoning that the state had been paid by the surety, irregardless of the status of the surety's claim against the debtor. Id; See also In re Smothers, 60 B.R. 733, 735 (Bankr. W.D. Ky. 1986).

The Court in Trahan, 624 F.2d at 908, specifically rejected the analysis provide earlier in Gilbert v. United States Fidelity and Guaranty Co., 180 F. Supp. 794 (M.D. Ga. 1959), aff'd, 274 F.2d 823 (5th Cir. 1960). In Gilbert, 180 F. Supp 794, the guarantor, pursuant to a surety agreement, paid a Georgia state tax, which the principal had failed to pay. The principal was subsequently adjudicated bankrupt and discharged. The principal contended that enforcement of liability to the guarantor was barred as a result of the discharge. The court reasoned that pursuant to a

Georgia subrogation statute, it was as if the taxes remained unpaid and still due, rendering the debt nondischargeable under the Bankruptcy Act. Id. at 796.

The line of reasoning set forth in Gilbert, 180 F. Supp. 794, was later adopted by the Eleventh Circuit in In the matter of Waite, 698 F.2d 1177 (11th Cir. 1983). A similar situation involving payment by the surety of an alcoholic beverage tax arose in Waite. The court reasoned that if the tax had gone unpaid, the state would have been vested with a right to prevent discharge of the tax debt, and consequently, the surety should be subrogated to this right. In In re Hancock, 36 B.R. 709 (Bankr. S.D. Ill. 1984) the court also concluded that a debt which is owed a surety under a bond providing for payment of a state sales tax was nondischargeable. The court appears to have followed the holding in Gilbert, 180 F. Supp. 794, noting that "the policy considerations underlying the nondischargeability provisions of the Bankruptcy Act remain unchanged in the Bankruptcy Code." Hancock, 36 B.R. at 710.

Subrogation, by its nature, is an equitable right, dependent on the circumstances in a particular instance

for its application. In re Co-Build Companies, Inc., 21 B.R. 635 (Bankr. E. D. Pa. 1982); In re Alloway, 37 B.R. 420, 423 (Bankr. E.D. Pa.1984). The principal of subrogation is well recognized in Texas. In Crimmins v. Lowry, 691 S.W. 2d 582, 585 (Tex. 1985) the Texas Supreme Court stated that this equitable right springs from the surety's promise to pay a debt of the principal, permitting the surety to bring an action against the principal on the debt.

It appears to this court that the majority of cited authority holds that a surety which pays a tax debt steps into the shoes of the taxing authority to claim nondischargeability status.[1] See In re Caffrey, 77 B.R. 219, 221 (Bankr. W.D. Mo. 1987); In re Woerner, 19 B.R. 708, 712 (Bankr. Kan. 1982); In the matter of Waite, 698 F.2d 1177; Thomas International Corp. v. Morris International Corp. v. Morris (In re Morris), 31 B.R. 474 (Bankr. N.D. Ill. 1983). In In re Cooper, 83

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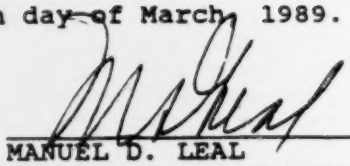
[1]Although this court rules in accordance with the majority of authority, it notes the weakness of the logic employed in these cases. The purchase of the surety bond constituted contractual payment for protection. Whereas the relationship between Hartford and Fields was contractual, the relationship between Hartford and the taxing authority was not.

B.R. 544, 548 (Bankr. C.D. Ill. 1988) the court apparently viewed the position of the Eleventh Circuit in Trahan to go beyond the parameters of the Bankruptcy Code. The court concluded that:

> [w]hile the court is aware of the rule that that [sic.] the nondischargeability provisions are to be read liberally in favor of a debtor's fresh start, to read section 523(a)(1) to be limited to debts actually owed to the tax collector or those obligations actually entitled to priority under section 507(a)(7) of the Code would be to read into the statute language that is simply not there.
> Id. See also, In re Woerner, 19 B.R. at 712 (Code does not expressly preclude nondischargeability of subrogated claim).

Hartford appears to this court to have shouldered its burden of proof regarding the nondischargeability status of its claim. Having paid the beverage tax on behalf of Fields, Hartford is to be provided the opportunity to seek reimbursement. The motion to dismiss the complaint is denied and Hartford's claim is determined to be nondischargeable. Hartford is awarded attorneys fees and costs.

Signed this the 15th day of March, 1989.



MANUEL D. LEAL
UNITED STATES BANKRUPTCY JUDGE

time, Crawford tipped his shoulder and reached further down.

Under these circumstances, a reasonable officer could well fear for his safety and that of others nearby. He could reasonably believe that Crawford had retrieved a gun and was about to shoot. That is, an officer would have probable cause to believe that "the suspect pose[d] a threat of serious physical harm." *Garner*, 471 U.S. at 11, 105 S.Ct. at 1701. Anderson had repeatedly warned Crawford to raise his hands and was now faced with a situation in which another warning could (it appeared at the time) cost the life of Anderson or another officer. Under such circumstances, an officer is justified in using deadly force to defend himself and others around him. Accordingly, the individual defendants are entitled to summary judgment as a matter of law.

The fact that the vehicle was "totally surrounded" by police does not change matters; had Crawford in fact retrieved a gun from beneath his seat, he could have caused injury or death despite the presence of numerous police officers. Also irrelevant is the fact that Crawford was actually unarmed. Anderson did not and could not have known this. The sad truth is that Crawford's actions alone could cause a reasonable officer to fear imminent and serious physical harm.[8]

Conclusion

Since the individual defendants are entitled to summary judgment, we must reverse the district court's denial of their motion. In addition, since no federal claims remain against the individual defendants, we instruct the district court to dismiss the pendent state claims against those defendants as well, without prejudice to refiling those claims in state court.[9]

A case of this gravity demands the utmost care. Here, for reasons neither explained nor evident, there was a complete failure to provide the evidence required in response to a summary judgment motion. The rules in this regard are clear and well-established; we are without authority to waive them.

For the reasons stated above, we REVERSE the district court's denial of summary judgment for the individual defendants; DISMISS the appeal of the City of Waco; and REMAND for entry of summary judgment in favor of the individual defendants, dismissal without prejudice of pendent state claims against the individuals, and further proceedings consistent with this opinion.



In the Matter of Herbert W. FIELDS, Jr., Debtor.

HARTFORD CASUALTY INSURANCE COMPANY, Appellee,

v.

Herbert W. FIELDS, Jr., Appellant.

No. 90-2735
Summary Calendar.

United States Court of Appeals,
Fifth Circuit.

March 21, 1991.

Surety which had paid Chapter 7 debtor's gross receipts taxes levied by Texas

8. The Supreme Court's decision in *Garner* is not to the contrary. There, the Court found unreasonable the shooting of an unarmed felony suspect, but the officer could see that the suspect's hands were empty and was "reasonably sure" he was unarmed; further, the suspect was fleeing, not reaching for an unknown object in repeated defiance of an order to raise his hands. *See* 471 U.S. at 1, 105 S.Ct. at 1694. In *Garner*, it was evident that the suspect posed "no immediate threat to the officer and no threat to others." *Id.* at 11, 105 S.Ct. at 1701. Here, all signs were to the contrary.

9. Such dismissal is perhaps the practice in this circuit, *see, e.g., McKee*, 877 F.2d at 416; *Jacquez*, 801 F.2d at 793, although there is disagreement as to whether it is mandatory, *see McKee*, 877 F.2d at 426 (dissenting in part); *Mintz v. Barthelemy*, 722 F.Supp. 273, 282 & n. 16 (E.D. La.), *aff'd*, 891 F.2d 520 (5th Cir.1989).

Alcoholic Beverages Commission filed complaint to determine dischargeability of debt. The United States Bankruptcy Court for the Southern District of Texas determined that surety's claim was nondischargeable, and debtor appealed. The District Court, Norman W. Black, J., affirmed, and debtor appealed. The Court of Appeals, E. Grady Jolly, Circuit Judge, held that surety, having paid debtor's taxes to Commission, became subrogated to state of Texas' right to exception from discharge.

Affirmed.

1. Bankruptcy ⇐3352

Gross receipts tax liability under Texas law for licensees and permittees of mixed beverages are nondischargeable in bankruptcy cases of such licensees and permittees. Bankr.Code, 11 U.S.C.A. § 523(a)(1)(A); V.T.C.A., Alcoholic Beverage Code § 204.01.

2. Bankruptcy ⇐3420(1)

Party seeking exception to discharge bears burden of proof as to nondischargeability.

3. Bankruptcy ⇐3385

Surety, having paid debtor's gross receipts taxes levied by Texas Alcoholic Beverages Commission, became subrogated to all rights that state of Texas had against debtor under Bankruptcy Code, including state's right to exception from discharge for tax liability. Bankr.Code, 11 U.S.C.A. § 523(a)(1)(A); V.T.C.A., Alcoholic Beverage Code § 204.01.

Michael J. Pledger, Houston, Tex., for appellant.

Gary L. Wickert, Houston, Tex., for appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before JOLLY, HIGGINBOTHAM, and JONES, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:

The debtor, Herbert W. Fields ("Debtor"), appeals from the district court's refusal to discharge a certain debt to his surety, Hartford Casualty Insurance Co. ("Hartford"), incurred when Hartford paid taxes on his behalf to the State of Texas. The issue presented by this case is whether Hartford can be subrogated to the State of Texas' right to an exception from discharge under 11 U.S.C. § 523(a)(1)(A)[1] of the Bankruptcy Code. Holding that Hartford is entitled to subrogation, we affirm.

I

The facts are brief and uncontested. Hartford issued a surety bond covering a mixed beverage permit to Debtor as the owner of two corporations known as Corky's Country and Carlos' 'N Charlies Del Norte, Inc.[2] The surety agreement bound Debtor as principal and Hartford as surety to the rights of the State of Texas for payment of all fees, taxes and penalties levied by the Texas Alcoholic Beverages Commission ("TABC").

Debtor filed for bankruptcy protection in late December 1984. Subsequently, during the periods of December 28, 1984 to October 16, 1985, and February 19, 1985 to October 2, 1985, Debtor failed to pay taxes covered by the surety bonds. Pursuant to the surety bond requirements, Hartford paid $15,479.58 to the State on November 21, 1985.

1. Section 523(a)(1)(A) of the Bankruptcy Code provides:

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does to discharge an individual Debtor from any debt—

(1) for a tax or a customs duty—

(A) of the kind and of the periods specified in section 507(a)(2) or 507(a)(7) of this title, whether or not a claim for such tax was filed or allowed;

2. Texas Alcoholic Beverage Code § 204.01 (Vernon 1978 & 1991 Supp.) requires licensees and permittees of mixed beverages to furnish a bond to secure the payment of the gross receipts tax.

II

On December 28, 1984, Debtor filed his Chapter 11 bankruptcy petition and properly scheduled Hartford as a creditor. The case was converted to a Chapter 7 case on October 29, 1986. The Chapter 7 Creditor's Meeting was noticed and held on December 16, 1986, and the deadline for filing complaints to determine dischargeability under 11 U.S.C. 523(c) was established as February 16, 1987. Hartford failed to file a Complaint to Determine Dischargeability of Debt until February 9, 1988, nearly one year after the bar date. Debtor filed his Motion to Dismiss Complaint on March 9, 1988.

The Bankruptcy Court denied Debtor's motion, determining that Hartford's claim was nondischargeable under 11 U.S.C. § 523(a)(1)(A). Debtor appealed to the district court on the grounds that the debt was not automatically nondischargeable as taxes and that under any other theory Hartford's Complaint was not timely filed. The district court, however, affirmed the Bankruptcy Court's decision. Debtor timely appeals.

III

[1, 2] Initially, we note that if there had been no surety arrangement in this case and the claim was asserted by the State of Texas rather than Hartford, the debt would be nondischargeable under 11 U.S.C. § 523(a)(1)(A).[3] We must decide, however, whether a surety who pays a tax debt of another is subrogated to the State's right to an exception from discharge. As with all such claims, the party seeking an exception to discharge bears the burden of proof as to nondischargeability. *In re Benich*, 811 F.2d 943 (5th Cir.1987).

Debtor argues that the debt due Hartford arose as a result of an indemnity agreement, rather than as a tax. The tax exception, according to Debtor, was promulgated to facilitate tax collection and because Hartford is not a taxing authority, this policy concern is not promoted by rendering Hartford's claim nondischargeable. Similarly, there is no need to protect the surety, argues the Debtor, as the fees charged by Hartford for the issuance of surety bonds are designed to protect Hartford against losses. Debtor concludes that because Hartford is not a taxing authority, it has no right to levy taxes and is not entitled to nondischargeability status under 11 U.S.C. § 523(a)(1)(A). We are unpersuaded.

We last confronted this issue over thirty years ago in *Gilbert v. United States Fidelity & Guaranty Co.*, 180 F.Supp. 794 (M.D.Ga.1959), *aff'd per curiam*, 274 F.2d 823 (5th Cir.1960). *Gilbert* is similar to the case at bar. Pursuant to a surety agreement, USF & G paid taxes due the State of Georgia that Gilbert had failed to pay. After Gilbert was adjudicated bankrupt, he sought a determination that the debt owed the surety was discharged in his bankruptcy. The district court, however, held that the surety benefitted from a Georgia subrogation statute, and the taxes were treated as still due for the benefit of the surety. *Gilbert*, 180 F.Supp. at 796. We affirmed the holding that under the Bankruptcy Act, a surety who pays a debtor's tax liability is subrogated to the taxing authority's status to prevent the discharge of a claim for unpaid taxes. 274 F.2d at 823.

[3] *Gilbert* was decided, however, under the old Bankruptcy Act. Debtor argues that the adoption of the new Bankruptcy Code permits us to reexamine this issue and, if warranted, to disregard *Gilbert*. We acknowledge that if the Bankruptcy Code created a substantive departure from the Bankruptcy Act on the issue of a surety subrogation to tax debts, we would be released, at least to a degree,

3. It is uncontested that the taxes in question in this case are nondischargeable pursuant to § 507(a)(7). Section 507(a)(7), concerning priority of claims, lists a number of taxes including a "tax required to be collected or withheld and for which the debtor is liable in whatever capacity." The legislative history reveals that this category of taxes "includes excise taxes which a seller of goods is required to collect from a buyer and pay over to a taxing authority." S.Rep. No. 989, 95th Cong., 2d Sess. 71, *reprinted in* 1978 U.S.Code Cong. & Ad.News 5787, 5857.

from the precedential restraint of *Gilbert*. We believe that the adoption of the Bankruptcy Code, however, did not alter in any significant way, the bankruptcy law with respect to this issue.[4] We are therefore bound by our previous decision in *Gilbert*. *See Ford v. United States*, 618 F.2d 357, 361 (5th Cir.1980). As stated in *Gilbert*, "it is as if the taxes themselves have not been paid and are still due and, of course, are not dischargeable in bankruptcy." 180 F.Supp. at 796. Accordingly, we hold that Hartford, having paid Debtor's taxes to the TABC, is subrogated to all the rights that the State of Texas had against Debtor under the Bankruptcy Code.[5]

The Eleventh Circuit has also concluded that our holding in *Gilbert* survives the adoption of the Bankruptcy Code. In *In re Waite*, 698 F.2d 1177 (11th Cir.1983), the surety made an identical claim as Hartford. The surety argued that it was entitled to be subrogated to the rights and standing of the State of Tennessee to assert nondischargeability under 11 U.S.C. § 523(a)(1)(A) for unpaid liquor sales taxes of the kinds specified by 11 U.S.C. § 507(a)(6).[6] The Eleventh Circuit agreed, holding specifically that *Gilbert* survived the enactment of the Bankruptcy Code.[7] The *Waite* court reasoned that:

> While *Gilbert* concerned the old Bankruptcy Act, the new Bankruptcy Code does not furnish a principled basis for distinguishing this case. Neither statute expressly indicates whether the nondischargeability of tax debts extends to debts owed to a surety which has paid the Debtor's tax debts.

698 F.2d at 1178. We note that the majority of courts that have addressed this issue have likewise held that a surety is entitled to subrogation under § 523(a)(1)(A).[8]

4. Specifically, the Bankruptcy Act provided that a "discharge in bankruptcy shall release a bankrupt from ... all of his provable debts ... except such as (1) are due as a tax ..." 11 U.S.C. § 35 (1964) (repealed). Section 523(a)(1) of the Bankruptcy Code states that a "discharge ... does not discharge an individual debtor from any debt for a tax...."

5. *Gilbert* relied on a Georgia law that permitted subrogation. Similarly, we note that the principle of subrogation is well recognized in Texas. Texas law provides that a surety "is subrogated to all of the judgment creditor's rights." Tex. Bus. & Comm.Code Ann. § 34.04 (Vernon 1990). The Texas Supreme Court has also held that a surety is subrogated to all of the rights of the original creditor:

> Because the surety promises to pay the debt of another, equity confers the right of subrogation. If the surety or party in the position of a surety pays the debt of the principal, the surety is subrogated to all of the rights, remedies, equities, and securities of the creditor.

Crimmins v. Lowry, 691 S.W.2d 582, 585 (Tex. 1985).

6. Now 507(a)(7), renumbered 1984.

7. Because decisions of the Fifth Circuit that were decided on or before September 20, 1981, are binding on the Eleventh Circuit, the *Waite* court necessarily had to address the same issue with respect to the precedential effects of *Gilbert*. *See, e.g., Bonner v. Prichard*, 661 F.2d 1206, 1209 (11th Cir.1981).

8. *See, e.g., In re Norris*, 107 B.R. 592 (E.D.Tenn. 1989); *In re Trasks' Charolais*, 84 B.R. 646 (D.S.D.1988); *In re Cooper*, 83 B.R. 544 (C.D.Ill. 1988); *In re Zoglman*, 78 B.R. 213 (W.D.Wis. 1987); *In re Caffrey*, 77 B.R. 219 (W.D.Mo.1987); *In re Morris*, 31 B.R. 474 (N.D.Ill.1983); *In re Alloway*, 37 B.R. 420 (E.D.Pa.1984); *In re Hancock*, 36 B.R. 709 (S.D.Ill.1984); *In re Woerner*, 19 B.R. 708 (D.Kan.1982); *In re Gibbs*, 11 B.R. 320 (W.D.Mo.1981).

The Ninth Circuit is the one notable exception to this majority. *See, e.g., National Collection Agency, Inc. v. Trahan*, 624 F.2d 906 (9th Cir. 1980). The *Trahan* court expressly refused to follow our decision in *Gilbert*. 624 F.2d at 907–08. The court emphasized a general policy of the Bankruptcy Code was to grant debtors a fresh start. Nevertheless, it recognized an exception to this policy for taxes because of the "overriding need to assure tax collection by government entities." *Id.* at 907. The court reasoned that permitting a surety to assert the rights of the State would not promote the collection of taxes, and would actually run contrary to the policy of providing debtors a fresh start. *Id.* As a result, the *Trahan* court held that California surety law conflicted with federal bankruptcy law. *Id.*

We disagree. Because Texas required the bond specifically to secure payment of the taxes, we think the debt paid by the surety is a tax "of the kind" specified in § 506(a)(7). Furthermore, we do not see how the *Gilbert* holding interferes with the fresh start contemplated for debtors by the Code:

> [a] debtor's fresh start is not overburdened by excepting a surety's subrogation claim from discharge. The debtor's fresh start is the same; he owes the same amount of nondischargeable tax debt; the only difference is whether the debtor owes the debt to the government or the surety.

IV

Because Hartford has met its burden of proving that it is entitled to be subrogated to the nondischargeability rights of the State of Texas, the decision of the district court is

AFFIRMED.



Stella HULL, Plaintiff-Appellant,

v.

CUYAHOGA VALLEY JOINT VOCATIONAL SCHOOL DISTRICT BOARD OF EDUCATION, et al., Defendants-Appellees.

No. 90-3360.

United States Court of Appeals, Sixth Circuit.

Argued Jan. 23, 1991.

Decided Feb. 15, 1991.

Nontenured black female teacher brought civil rights action against school board, superintendent, executive director, and school administrator after she was nonrenewed. The United States District Court for the Northern District of Ohio, John J. Manos, J., granted defendants' motion for summary judgment. Employee appealed. The Court of Appeals, Contie, Senior Circuit Judge, held that: (1) nonrenewal of contract did not give rise to action under § 1981; (2) defendants were not two separate "people" to form conspiracy; (3) district court erred in applying two-year statute of limitations to all but discriminatory discharge claims; and (4) evidence did not support actions against individual defendants or board.

Affirmed in part, and reversed and remanded in part.

In re Norris, 107 B.R. 592, 596 (E.D.Tenn.1989).

1. Civil Rights ⇐144

Nonrenewal of black female employee's contract did not impede employee's right to "make or enforce" contracts and thus was not cognizable under § 1981. 42 U.S.C.A. § 1981; Ohio R.C. §§ 3319.11, 3319.11(E).

2. Conspiracy ⇐2

As general rule, corporation cannot conspire with its own agents or employees.

3. Conspiracy ⇐7.5

School district superintendent, executive director of district, and school administrator were not two separate "people" so as to be able to form conspiracy, and thus could not be found to have conspired to violate civil rights statute; all three were employees or agents of school board, and thus all were members of same collective entity. 42 U.S.C.A. § 1985(2, 3).

4. Civil Rights ⇐210

Under Ohio law, applicable limitations period for § 1983 claims is two-year limitations period for actions involving bodily injury or injury to personal property. Ohio R.C. § 2305.10; 42 U.S.C.A. § 1983.

5. Limitation of Actions ⇐58(1)

"Continuing violation" theory applied to render § 1983 claims by nontenured black female teacher timely; teacher alleged discriminatory working conditions throughout term of her employment which were related to her discharge, and, prior to events surrounding her discharge, teacher was not warranted in filing race discrimination suit. Ohio R.C. §§ 2305.09(D), 2305.10; 42 U.S.C.A. § 1983.

6. Civil Rights ⇐192, 196

To establish personal liability of individual defendants under § 1983, plaintiff was required to show that they deprived her of federal right while acting under color of state law. 42 U.S.C.A. § 1983.

7. Civil Rights ⇐240(2)

Superintendent's racial animus towards nontenured black female teacher